

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 NORTHERN DIVISION

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5 CHRISTOPHER JOSEPH TUVELL,)

6 individually and as the heir of)

7 David Christopher Tuvell, et al.,)

8 Plaintiffs,)

9 vs.) CASE NO. 1:12-CV-128DB

10 BOY SCOUTS OF AMERICA, et al.,)

11 Defendants.)

12 _____)

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14 BEFORE THE HONORABLE DEE BENSON

15 -----

16 August 27, 2013

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18 Motion Hearing

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1 A P P E A R A N C E S
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1 August 27, 2013

2:30 p.m.

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4 P R O C E E D I N G S

5 THE COURT: Good afternoon.

6 Christopher Joseph Tuvell, et al., versus Boy
7 Scouts of America, et al. 12-CV-128. We're here on
8 defendant Blue Water Scuba's and Lowell Huber's motion to
9 dismiss the first and third causes of action in the amended
10 cross claim of the defendant Boy Scouts of America and Great
Salt Lake Council of the Boy Scouts of America.

11 Representing the movants is -- yes, sir. Please
12 tell me your name.

13 MR. WALDBILLIG: Gainer Waldbillig and David
14 Concannon.

15 THE COURT: Thank you.

16 Mr. Concannon, you're here from Wayne,
17 Pennsylvania?

18 MR. CONCANNON: That is correct, Your Honor. It
19 is just outside of Philadelphia.

20 THE COURT: That is a long ways to come for this
21 hearing, but it is nice to have you here.

22 MR. CONCANNON: Thank you very much.

23 THE COURT: For the defendants Boy Scouts of
24 America and Great Salt Lake Council, Inc., Michael Skolnick.

25 MR. SKOLNICK: Good afternoon, Your Honor.

1 THE COURT: Good afternoon.

2 Are these other attorneys with your firm?

3 MR. SKOLNICK: No, Your Honor. They are
4 representing other parties.

5 THE COURT: What are your names?

6 MR. GILCHRIST: Bob Gilchrist. I represent the
7 plaintiffs, Your Honor.

8 THE COURT: I see. I thought you said they are
9 parties, but they represent other parties.

10 MR. SKOLNICK: Yes.

11 THE COURT: You represent --

12 MR. GILCHRIST: Plaintiffs.

13 MR. BROWN: I am Spencer Brown and I represent the
14 Professional Association of Dive Instructors.

15 THE COURT: The what?

16 MR. BROWN: Professional Association of Dive
17 Instructors, P.A.D.I.

18 THE COURT: Okay. The dive instructors. It is
19 nice to have you both here.

20 It is your motion, Mr. Waldbillig. Are you going
21 to address it?

22 MR. WALDBILLIG: Mr. Concannon will, Your Honor.

23 THE COURT: Mr. Concannon, please.

24 MR. CONCANNON: Thank you, Your Honor.

25 May it please the Court, David Concannon for the

1 defendants Blue Water Scuba of Logan, Lowell Huber and
2 Corbett Douglas.

3 It is a fairly straightforward motion under Rule
4 12(b)(6) to dismiss two of the three counts of the
5 cross-claim of the Boy Scouts. The first cross-claim is for
6 breach of contract against Huber and Blue Water, and the
7 second and the third are for indemnification against Huber
8 and Blue Water, and those are at issue, and the second
9 cross-claim for respondeat superior is not at issue in this
10 motion.

11 The breach of contract cross-claim alleges that a
12 contract that was entered into in 2010 between Blue Water
13 and the Boy Scouts, and just so that I get the parties
14 right, it is the Great Salt Lake Council B.S.A. and Blue
15 Water Scuba of Logan. That contract on its face, and we
16 have submitted it to the Court, was only for a term of three
17 months, from June until August 31st of 2010, and then it
18 expired on its face. There was no contract for the 2011
19 season, which is when this unfortunate accident took place.
20 The Boy Scouts are alleging that the contract somehow
21 renewed itself by mutual assent and performance, which is
22 kind of a vague allegation, and they have not acknowledged
23 that they performed in 2011 and we have moved to dismiss
24 that count for failure to state a claim.

25 There is no written renewal obviously that is at

1 issue and the parties to the renewal and the terms of the
2 alleged renewal are not specified in the cross claim.

3 On the indemnification count, which is count
4 three, there is no written contract of any kind for
5 indemnification whatsoever. It is not addressed in the 2010
6 agreement that they are alleging was breached. We don't
7 know who the parties to this indemnification were supposed
8 to be. Blue Water ceased business or its corporate
9 registration expired in April of 2011 before the accident
10 took place, and we don't believe that they have stated a
11 claim upon which relief can be granted on count three.

12 Thank you.

13 THE COURT: Thank you very much.

14 Mr. Skolnick.

15 MR. SKOLNICK: Thank you, Your Honor.

16 May it please the Court, counsel, Your Honor, Blue
17 Water's motion is essentially asking this Court to dismiss
18 without any discovery, without any ability to find out what
19 they say about specific allegations in the amended cross
20 claim at this early stage of the case, and rule that right
21 now the Court could not possibly find under the terms that
22 have been pled a written contract which renewed by mutual
23 assent and conduct in 2011. We would submit to the Court
24 that that is an incorrect conclusion.

25 I would like to invite the Court's attention to

1 the contract itself. It has been provided to the Court
2 among the papers from the Blue Water defendants. It is
3 their first exhibit. The nature of the contract, Your
4 Honor, is critically important, especially with respect
5 to -- does the Court need a moment to find it?

6 THE COURT: I need it.

7 Do you have it? Do I have it in this book?

8 MR. SKOLNICK: It should be in the courtesy copies
9 that we provided to the Court, Your Honor, at tab one.

10 THE COURT: I have it now.

11 Thank you.

12 MR. SKOLNICK: Thank you, Your Honor.

13 The reason that I invite the Court's attention to
14 this and want to emphasize it is that Blue Water argues some
15 very specific case law about why indemnification could not
16 exist, why it should not be found and why the parties'
17 relationship could never establish that. I think that is
18 correct based on this contract and I will explain why. The
19 cases that they cite talk about looking at the practical
20 effect of the contract.

21 This contract, Your Honor, if you look at it, has
22 a number of very specific duties imposed on the outfitter,
23 Blue Water. The outfitter, Blue Water, does everything.
24 That is appropriate because the outfitter, Blue Water, is
25 the expert in diving. The Great Salt Lake Council is not an

1 expert in diving. If you look at the contract, in section
2 three there is about one sentence or two sentences, rather,
3 of things they are supposed to do. They are supposed to
4 advertise before camp and they are supposed to help with
5 registration.

6 If you look at section two of the contract, Blue
7 Water does everything that has to do with diving. David
8 Tuvell's death had to do with diving. It had to do with the
9 services that Blue Water was providing through this
10 contract. The reason that we believe that this contract
11 governs and that the evidence will bear that out is because
12 there is no other contract. There is no written contract.
13 The Blue Water defendants have not come forward and said
14 there is an oral contract, but, Your Honor, they have
15 admitted in the pleadings filed in this case that they
16 showed up in 2011 and provided services.

17 We will show eventually that they were the same
18 services that they provided the year before. This contract,
19 Your Honor, is very clear that it may be renewed by mutual
20 agreement. There is a distinction that is also very clear,
21 and if the Court looks at page 2 of the contract it says in
22 paragraph four changes must be made by written agreement.

23 Now, Blue Water attempts to gloss over or perhaps
24 confuse that issue and I want to straighten out any
25 confusion that may exist. We don't allege in our amended

1 cross claim that there was any change. In fact, it is quite
2 the opposite. We allege that it is the same deal as existed
3 in 2010. If the Court looks at paragraph five, it says that
4 it may be renewed annually upon the agreement of both
5 parties. The Court I am sure will be sensitive to the fact
6 that there is no mention of a written agreement of the
7 parties, it just says agreement of the parties. That is
8 what we have pled, that it renewed by agreement of the
9 parties as evidenced by the fact that Blue Water shows up
10 and Great Salt Lake Council registers and advertises and
11 this boy, David Tuvell, does not die on the day in question.

12 We allege in our first cause of action breach of
13 contract against Mr. Huber and Blue Water, that at a minimum
14 they breached the contract by failing to name Great Salt
15 Lake Council as an additional insured. In this 2010
16 contract they are required to do that. They are supposed to
17 provide \$2 million of insurance, Your Honor. The evidence
18 that is before the Court is that we on behalf of our clients
19 made a request and requested information about that and
20 there is no insurance. They didn't perform that obligation.

21 So at this early stage of the pleadings, where all
22 the pleadings are construed in a light most favorable to the
23 non-movant, namely Great Salt Lake Council, the Court is to
24 conclude that this contract renewed, renewed by mutual
25 assent and conduct, and that there was a duty that was

1 breached here. Namely, you're supposed to insure Great Salt
2 Lake Council for \$2 million.

3 It is obvious why that is. Again, it ties in to
4 this indemnification cause of action, and it is because
5 Great Salt Lake Council does not know anything about diving.
6 They are not divers. They contracted with this outfitter,
7 Blue Water and Huber, to provide that service. They
8 understand that they are contracting with P.A.D.I., a
9 certified nationally or internationally recognized dive
10 organization, a certified provider of that service. Because
11 they are not a provider themselves, Great Salt Lake Council
12 wants Blue Water and Huber to obtain insurance and indemnify
13 them, effectively indemnify them against any claim such as
14 this. They don't want to be dragged into Federal Court in
15 Salt Lake and sued for a boy's death who passes away during
16 a dive.

17 Again, the effect of this contract is to seek that
18 protection and that level of protection in terms of get us
19 insurance, provide all of these services and you're
20 responsible for them, not us.

21 THE COURT: Technically indemnification does not
22 mean to provide insurance, and I don't have your complaint
23 in front of me, but tell me exactly what your
24 indemnification cause of action is based upon. Is it based
25 solely upon the contractual provision?

1 MR. SKOLNICK: Yes, Your Honor.

2 It is based on this written contract that we argue
3 renewed in 2011 and the effect of it.

4 THE COURT: But it is not a contract to indemnify
5 directly, right?

6 MR. SKOLNICK: We would concede that it does not
7 say indemnify in it, Your Honor.

8 THE COURT: Why, just out of curiosity for
9 pleading purposes, why do you have a cause of action in
10 which you seek indemnification? It sounds like what you're
11 seeking is a breach of contract claim for failing to get the
12 \$2 million insurance policy and put you on as an insured.

13 MR. SKOLNICK: We also have that, Your Honor.

14 THE COURT: Tell me why you need both. And, if
15 so, how do you get to indemnification through being provided
16 as an insured?

17 MR. SKOLNICK: I would be happy to address that,
18 Your Honor. It ties in to what I was saying about the case
19 law that the plaintiff relies on.

20 They cite a line of cases, including Kennecott
21 Copper Corporation, and it is a Tenth Circuit case, and it
22 is before the Court in their reply memorandum, and Kennecott
23 Copper Corporation says that under Utah law, and I am
24 reading at headnote three, the summary, under Utah law the
25 actual effect of an agreement rather than its mere form

1 governs in determining whether rules governing
2 indemnification should apply. That is why I was referring
3 earlier, Your Honor, to the actual effect of this contract
4 which renewed in 2011. The actual effect is to make this
5 set of parties, the Blue Water defendants, responsible for
6 the dive operation. B.S.A. or rather Great Salt Lake
7 Council is not responsible for the dive operation.

8 When you look at the actual effect of the deal
9 between the parties, you get us \$2 million of insurance and
10 you perform all these dive functions, and the actual effect
11 of that, I would submit, again, and it is in the early stage
12 of the pleadings, is the indemnification or requirement to
13 indemnify because they didn't get the insurance.

14 If they didn't get the insurance, what is our
15 recourse? Well, you should have gotten us insurance. Shame
16 on you. If they don't indemnify and if they don't have a
17 requirement to step in and indemnify, we are prevented from
18 appreciating the benefit of our bargain, which is we're
19 going to be protected against having to step in and defend
20 against a case like this where negligence in providing the
21 dive operation is what is alleged.

22 THE COURT: Right, but wouldn't you get to the
23 same place with a breach of contract claim?

24 MR. SKOLNICK: We may or may not, Your Honor.

25 THE COURT: Well --

1 MR. SKOLNICK: We may or may not. It may be a
2 belt and suspenders approach, and the Court may think that
3 just the breach of contract is enough, and that is all that
4 the Court can really see, but I would just submit that at
5 this early stage the Court should view the pleadings in a
6 light most favorable to the Great Salt Lake Council, and
7 give us an opportunity to at least explore whether the
8 actual effect of this document, including the intent of the
9 parties, was to indemnify and make Mr. Huber and Blue Water
10 responsible.

11 I think it is even more important when we learn
12 that Blue Water is out of business, so now we only have
13 Huber to look to. Mr. Huber is an individual, not an
14 entity, and we don't know what assets he may have. We don't
15 know what ability to defend he may have. We suspect he is
16 defending here under some policy of insurance that at least
17 named him and Blue Water as insureds. We have not been able
18 to do any discovery to verify that yet.

19 Again, Your Honor, it is more of a close question
20 on the indemnification than on the breach of contract, and
21 we concede that and there is not an express provision, but
22 you don't look to necessarily just the express provision,
23 and under the law that Blue Water's own counsel has cited to
24 the Court, this Kennecott Copper case, and the Utah line of
25 cases that they cite is similar.

1 I am looking at the Meadow Valley Contractors
2 case, which is a Utah Court of Appeals case, and if you look
3 at paragraph 19 in that case, it talks generally about what
4 Blue Water is arguing here, that the mere agreement to
5 provide insurance in and of itself does not mean that you
6 have an indemnification obligation.

7 Now, I inserted the phrase in and of itself in my
8 interpretation of that, but I submit to the Court that that
9 is a reasonable interpretation, if you look at this universe
10 of case law that we have been talking about and the actual
11 effect of the document. You don't just look in isolation
12 and say, okay, the contract says you have to insure, but it
13 does not specifically say indemnify so there is no duty to
14 indemnify. It is a broader analysis than that, I would
15 submit to the Court, and we need an opportunity to explore
16 it at this early stage.

17 THE COURT: In the reply brief the movant says,
18 and I'm quoting from their brief --

19 MR. SKOLNICK: At what page, Your Honor? I have
20 it handy.

21 THE COURT: Page 4.

22 In the Kennecott Copper case the Tenth Circuit
23 rejected an attempt by General Motors to force Kennecott
24 Copper to indemnify when the latter had only agreed to
25 provide insurance.

1 MR. SKOLNICK: I see that, Your Honor, and I
2 appreciate that argument, but they didn't in their reply
3 brief talk about this actual effect language in Kennecott
4 Copper. That has not been mentioned or discussed at all. I
5 read to the Court what the Kennecott Copper court said about
6 looking at the actual effect, and beyond the headnote it is
7 even more explicit if you look further on in the case in
8 headnotes two and three, and at the end of that section it
9 says we are satisfied that Utah would look to the actual
10 effect of the agreement rather than its mere form to
11 determine whether the rules governing indemnification should
12 apply.

13 Again, it comes back, Your Honor, to the same
14 thing I have been advancing to the Court, actual effect, and
15 if you look at the actual effect of that contract, it is to
16 make Blue Water and Huber responsible, not Great Salt Lake
17 Council, because of this area of very specialized knowledge
18 and skill that is involved here.

19 THE COURT: Then why didn't they just put in the
20 contract an agreement to indemnify?

21 MR. SKOLNICK: I guess they could have done that
22 and I guess in an ideal world they would have done a written
23 contract in 2011, but we're dealing with a charitable
24 organization that has a broad volunteer base and a
25 relatively small professional staff and they are stretched

1 pretty thin.

2 I think that once we eventually get to trial if we
3 were looking at why specific terms were not put into the
4 contract, I would be offering some evidence about that, but
5 I think that is the best I can do in response to the Court's
6 question today. Number one, I don't know, and, number two,
7 those are what I suspect are some of the factors involved.

8 THE COURT: You want to get something that your
9 client didn't specifically contract for. You contracted for
10 something different, at least on its face, and there is a
11 difference between requiring the contracting partner to
12 cover you with insurance than to indemnify.

13 MR. SKOLNICK: Well, if you look at the actual
14 effect, Your Honor, and coming back to that, and I may
15 disagree with the Court about this, but I will take a stab
16 and see if I can parse our differences, but I think the main
17 difference is with respect to what did the parties intend.
18 We don't know that at this stage. I think the contract may
19 be somewhat ambiguous on that point, but if we're talking
20 about contract interpretation, it would be good to have some
21 evidence about what the intent was by both sides.

22 Aside from intent --

23 THE COURT: Well, it is not very ambiguous, it
24 seems to me.

25 MR. SKOLNICK: I would submit the same thing, Your

1 Honor, that --

2 THE COURT: There is nothing particularly
3 ambiguous about outfitter agrees to provide scouts with
4 evidence of liability insurance in the amount of \$2 million,
5 and agrees to name the Great Salt Lake Council, B.S.A., as
6 an additional insured on the policy.

7 That is pretty clear.

8 MR. SKOLNICK: Your Honor, I submit that 2-D is
9 also very clear. Outfitter, that is Blue Water, agrees to
10 observe all B.S.A. safety rules and policies in the
11 operation of the programs. Well, it is alleged that they
12 didn't do that, so is B.S.A. now going to be required to
13 defend and indemnify themselves because they didn't do that?
14 That is the actual effect of not finding that an
15 indemnification agreement exists. It comes down to the
16 purpose of the contract and the effect of the contract, Your
17 Honor, again, pursuant to their own case law that they are
18 advancing in their reply memo.

19 THE COURT: Anything else?

20 MR. SKOLNICK: May I just review for a moment?

21 THE COURT: Yes.

22 MR. SKOLNICK: I think I may be done, but I want
23 to make sure that I covered everything that I intended to.

24 I think it is instructive, Your Honor, to look at
25 the answer that was filed by Blue Water. This is docket

1 number 65, paragraph 13, where Blue Water admits the
2 following things, including that David Tuvell was, quote,
3 participating in a discover scuba program offered by
4 G.S.L.C., Lowell Huber and/or Blue Water Scuba. So they
5 lump all of those parties together without reference to what
6 the individual parties' responsibilities are. Where can we
7 determine those individual responsibilities if not the
8 contract that we argue renewed in 2011?

9 That reminds me, Your Honor, that I have not spent
10 a lot of time on the statute of frauds argument, and I would
11 be happy to address that if it is of concern to the Court.

12 THE COURT: I don't think so, but tell me, in 2010
13 did the outfitter provide the insurance?

14 MR. SKOLNICK: I don't know the answer to that,
15 Your Honor.

16 THE COURT: What if they didn't, then where are
17 you going to be on your renewal claim?

18 MR. SKOLNICK: Well, I don't know, Your Honor. I
19 suppose if the Great Salt Lake Council did not insist on
20 that provision being observed in 2010, it might be some
21 argument against renewal, but I don't think it would be
22 decisive by any means.

23 THE COURT: I just wondered.

24 MR. SKOLNICK: I think it could be a factor to be
25 considered. I don't think it would be decisive. It may not

1 even be informative. It may just be a term that was not
2 enforced in 2010 but renewed in 2011 and was required in
3 2011.

4 THE COURT: Then you would really need
5 indemnification.

6 MR. SKOLNICK: Then we might be more in need of
7 it, Your Honor. That is a good point and I agree.

8 THE COURT: Thank you.

9 MR. SKOLNICK: All right.

10 THE COURT: Thank you for your argument.

11 Let me hear your response --

12 MR. CONCANNON: Thank you, Your Honor.

13 THE COURT: -- Mr. Concannon.

14 MR. CONCANNON: With all due respect to Mr.
15 Skolnick, who I just met today for the first time --

16 THE COURT: I didn't mean to bypass you two.
17 You're kind of pushed back like you are not up to the table.
18 I didn't ask you, but if you want to speak ever during this,
19 let me know.

20 MR. GILCHRIST: We are up to the task but not up
21 to the table. Thank you.

22 THE COURT: Go ahead.

23 MR. CONCANNON: Thank you.

24 I didn't hear Mr. Skolnick answer the Court's
25 question about whether the contract specifically provided

1 for indemnification other than say, no, it does not. It is
2 clear. This is a very short agreement. It is two pages.
3 It is not clear who drafted it, and I don't believe that
4 Mr. Huber drafted it, but it would have been easy for the
5 drafter to have put in there that you provide insurance and
6 indemnification. It would have been easy for the drafter to
7 put in there not that this contract expires on August 31st,
8 2010, but that the term of the contract this year is until
9 August 31st and it renews automatically thereafter unless
10 terminated by mutual agreement of the parties. That is not
11 here.

12 As far as indemnification is concerned, I think
13 the four corners of the agreement are fairly clear, and it
14 is a very brief agreement and it provides for some very
15 specific stuff, advertising, who collects the money, who
16 does what, and it would have been easy for them to put
17 indemnification in here if the parties intended that.

18 I am not familiar with a provision in the Federal
19 Rules of Civil Procedure that allows you to think of a
20 potential claim, get discovery on it, and then assert it
21 later. We are here because there is no claim upon which
22 relief can be granted on indemnification. There is no
23 written contract. There is no case law provided by the Boy
24 Scouts. There is nothing but Mr. Skolnick on contracts. It
25 is a very broad interpretation of a very simple, easy to

1 understand document that says that it provides for something
2 that the parties did not express.

3 It could have been that the intent of the parties
4 was to provide pizza on Thursdays, but it is not in here and
5 it stretches the credibility of the interpretation of this
6 agreement to say that you should have put in
7 indemnification, which is pretty serious, pay for an
8 attorney of our choice to defend this case through trial,
9 and we didn't bring it up and we didn't put in the contract
10 that that is what we intended in a written agreement when
11 the four corners of the written agreement are very specific.

12 THE COURT: Why would it necessarily include pay
13 for an attorney? The insurance would have done that.

14 MR. CONCANNON: You would think that it would, and
15 that is why it should be in writing, but what the Boy Scouts
16 have asked Mr. Huber to do is pay for counsel of their
17 choosing in addition to indemnify, in addition to provide
18 insurance, and that is the demand that came from
19 Mr. Skolnick's office. When they found the agreement that
20 had terminated on its face, then they asked for us to pay
21 for their defense in addition to Mr. Huber's defense. That
22 is what they want. That is why they filed this cross claim.
23 I don't see where that is anywhere in here.

24 That is the other issue here is what are the terms
25 of the proposed indemnification agreement? What are we

1 supposed to be agreeing to? What are the limits? It is
2 just not there.

3 THE COURT: Do you know if there was insurance
4 provided under the 2010 contract?

5 MR. CONCANNON: I do not know. I do not know the
6 answer to that question, but I can easily find out.

7 THE COURT: Apparently you're not hired by an
8 insurance company?

9 MR. CONCANNON: I actually am.

10 THE COURT: Under that contract?

11 MR. CONCANNON: I am under a term of insurance
12 that began on July 1st, 2011. The policy period was
13 July 1st to June 30th of 2012. I know that. I just don't
14 want to speculate, and frankly I handle these cases all over
15 the country and I don't pay attention to when a policy -- I
16 know when it began, but if it is not part of what I need to
17 do, I don't do it.

18 I can say this, that I know from investigating
19 this accident five days after it happened that there was not
20 a meeting of the minds between Huber and the Boy Scouts on
21 what was supposed to be done. If you want to talk about the
22 intent of the parties in the agreement, who is an expert in
23 providing scuba diving, and there is a premises liability
24 claim asserted here against the Boy Scouts, and who is an
25 expert in keeping young boys safe on the property that is

1 not Huber. That is the Boy Scouts. This accident occurred
2 in a roped off swimming area where guards had been provided
3 in 2010 when Mr. Huber and Blue Water, actually, more
4 accurately, had agreed to provide insurance, but they were
5 pulled in 2011.

6 If you want to go down this hole and waste
7 resources on whether or not there was indemnification or
8 there was removal and get into all that, which is a sideshow
9 to the real issues here, we're going to get into whether or
10 not Mr. Huber or Blue Water would have agreed to provide
11 insurance to a party that was not following their own safe
12 standards.

13 So we will go that way if we have to, but I don't
14 believe that this very simple agreement -- it says what it
15 says and it says that a change has to be in writing. The
16 terms of a contract is an integral part of the contract and
17 the parties to a contract are an integral part and
18 performance is an integral part and consideration is an
19 integral part. You can't just say that something happened
20 because of verbal -- when the contract says any changes have
21 to be in writing.

22 That is why we have moved to dismiss the first
23 counterclaim of breach of contract. Then when you want to
24 get to indemnification and you want to create provisions
25 that are not there at all, not just, well, paragraph five

1 does not say writing, but for something else entirely, I
2 just think that that stretches the bounds too far and is
3 beyond the pale.

4 Thank you.

5 THE COURT: Thank you.

6 MR. SKOLNICK: Your Honor, may I be heard briefly?

7 THE COURT: Yes, please.

8 MR. SKOLNICK: Thank you.

9 Your Honor, I would just ask that the Court
10 disregard the proffer of evidence about what the intent of
11 the parties was offered by counsel. I don't think that
12 should be considered by the Court and it is not before the
13 Court, as to Mr. Huber negotiating experts and I
14 investigated five days after, and that is not before the
15 Court and should not be factored into the Court's decision.

16 THE COURT: Well, I don't think he said anything
17 about intent. It is okay. I am not going to consider
18 anything that is not in the record evidence.

19 MR. SKOLNICK: Thank you, Your Honor.

20 THE COURT: Nothing else?

21 MR. SKOLNICK: No, Your Honor. That was all.

22 THE COURT: I asked my clerk to bring me a copy of
23 the amended complaint.

24 Is it entitled amended complaint? Is it a second
25 amended complaint or what is it?

1 MR. WALDBILLIG: I believe it is just the
2 complaint.

3 THE COURT: I don't mean the complaint. I mean
4 the cross claim.

5 MR. SKOLNICK: Our cross claim, Your Honor?

6 THE COURT: Yes.

7 MR. SKOLNICK: I believe I have that.

8 May I approach?

9 THE COURT: Yes, please.

10 MR. SKOLNICK: I believe that is it.

11 THE COURT: Now, in this cross claim, on the
12 indemnification cross claim, Mr. Skolnick, you conclude with
13 your paragraph 33 which says pursuant to Utah Code Annotated
14 Section 78-B-5-823 G.S.L.C. is entitled to indemnification.

15 Explain that a little further to me.

16 MR. SKOLNICK: Your Honor --

17 THE COURT: It does not appear to be contract
18 based.

19 MR. SKOLNICK: I apologize, Your Honor. I looked
20 at it briefly before I came over, and I meant to bring a
21 copy of the statute, but I don't have that before me.

22 THE COURT: How does that statute give you an
23 indemnification claim?

24 MR. SKOLNICK: That is what I'm saying. I am not
25 prepared to argue that. I apologize. If it is important to

1 the Court --

2 MR. WALDBILLIG: Your Honor, I believe it is the
3 comparative fault statute that is the section he is
4 referring to, but I am not positive. I think that is what
5 he is referring to. If that is true, then it just means
6 that there is no implied indemnity and there is no
7 contribution indemnity under the --

8 MR. SKOLNICK: That refreshes me, Your Honor, and
9 I appreciate counsel's courtesy with that.

10 It is with respect to the claims in the complaint
11 against Blue Water and what Blue Water is claimed to have
12 done and failed to do and us not being held -- us, Great
13 Salt Lake Council, not being held responsible for their
14 negligent conduct, if any.

15 THE COURT: All right. But not relying on that
16 provision, it appears that your indemnification claim is
17 based entirely on the insurance clause in the contract,
18 correct?

19 MR. SKOLNICK: No. I would disagree respectfully
20 with the Court. It is also based on the actual effect of
21 the contract, and taking into account the respective
22 responsibilities that are set out in paragraphs two and
23 three.

24 THE COURT: Okay. But you do agree that they are
25 incorrect in understanding that your indemnification claim

1 is based on a breach of contract?

2 MR. SKOLNICK: It is based on that written
3 contract that we say renewed in 2011, correct, Your Honor.

4 THE COURT: Well, it gets a little muddy to me.
5 The outfitter clearly agrees in the contract to observe all
6 of the B.S.A. safety rules and policies in the operation of
7 the program. I assume it is your argument that if they
8 didn't do that and that as a result the Boy Scouts are held
9 liable for something to the plaintiff here, that that should
10 trigger some entitlement to damages on your part because of
11 that breach of contract?

12 MR. SKOLNICK: Correct.

13 THE COURT: You think that is synonymous with
14 indemnification?

15 MR. SKOLNICK: The actual effect is synonymous,
16 correct, Your Honor.

17 THE COURT: Understood that way, it is just
18 another breach of contract claim. You call it
19 indemnification, but it is really just another breach of
20 contract claim.

21 MR. SKOLNICK: I suppose it could be characterized
22 that way, Your Honor, in the way that the Court has, and it
23 may be a matter of rubric, and it may be a belt and
24 suspenders approach, but we feel strongly that we have a
25 right under those contractual provisions to have them be

1 responsible financially for what was alleged to have
2 happened to this young man, not us.

3 THE COURT: Does that include hiring an attorney
4 to defend you?

5 MR. SKOLNICK: Well, we have asked for that and
6 they have graciously declined.

7 THE COURT: As you said to be responsible for the
8 harm caused to this family, and that is where you have to
9 scratch your head.

10 How far does indemnification go?

11 MR. SKOLNICK: I think that you have to look back
12 at the terms of the contract, and they should be required to
13 defend with respect to 2-A through 2-F, and in particular
14 2-A, provide all of the equipment and facilities and provide
15 for upkeep and care.

16 For instance, if the tanks were faulty, if the
17 underwater course that was designed by Mr. Huber and Blue
18 Water was faulty and contributed, why should B.S.A. have to
19 defend those things? It is Mr. Huber's responsibility under
20 this contract, Your Honor, to do that. If Mr. Huber didn't
21 have B.S.A.'s safety rules being applied and followed, that
22 is his responsibility under this contract.

23 We understand that there may be a defense advanced
24 by Blue Water that you said that you would get volunteers
25 for waterfront safety, but that is not what this contract

1 says.

2 THE COURT: Right, but we don't know exactly what
3 indemnify means.

4 MR. SKOLNICK: I would concede that, Your Honor.
5 It is suggested by 2-A through F.

6 THE COURT: You keep mixing it up. You want to
7 say why should we have to defend ourselves, and the
8 indemnification term or the indemnification agreement could
9 include providing a defense as well as responding to the
10 loss, right?

11 MR. SKOLNICK: Correct, Your Honor.

12 THE COURT: How are we going to know? You have
13 said several times it wouldn't be fair for the Boy Scouts to
14 respond with either a defense or to pay for this lawsuit if
15 it was Mr. Huber that caused it, right?

16 MR. SKOLNICK: I think the Court can --

17 THE COURT: Are we just turning the law into one
18 big ball of fairness?

19 MR. SKOLNICK: No, Your Honor.

20 I think the Court should err on the side of
21 finding a degree of definition, of definiteness in this
22 contract, and I would concede that that probably does not
23 include paying for an attorney right now. It may in the
24 future require them to reimburse our firm's fees. If at the
25 end of the day we rack up hundreds of thousands of dollars

1 in defense costs because we were brought into this case
2 because they were negligent for not doing 2-A through F,
3 then we may have a claim against them because we were
4 damaged by that.

5 THE COURT: I suppose it is not enough to have
6 faith in the jury system.

7 MR. SKOLNICK: If only it were, Your Honor.

8 THE COURT: In closing argument you want to say we
9 were not negligent at all. They were. Right?

10 If the jury comes back and finds them negligent
11 and not you, then all is well, at least in terms of your
12 being responsible for any losses. But if the jury somehow
13 comes back and holds you both liable, then you want to be
14 able to say we get indemnified somehow.

15 MR. SKOLNICK: We get indemnified for you.

16 THE COURT: Couldn't that same jury sort out that
17 question of fact?

18 MR. SKOLNICK: It may or may not. They may
19 apportion fault to us that really should not be apportioned
20 to us. The only thing that we're responsible for in here is
21 advertising and pre-camp registration.

22 THE COURT: Do we send to the same jury the
23 question of comparative fault, plus whether Blue Water Scuba
24 and Mr. Huber breached the contract and need to indemnify
25 you?

1 MR. SKOLNICK: We may need to under the cross
2 claim.

3 THE COURT: But don't the two concepts just
4 combine?

5 MR. SKOLNICK: I don't know that they --

6 THE COURT: Well, if they didn't provide the
7 equipment as required, and if they didn't follow the safety
8 rules as required and that adds up to their negligence, then
9 why would we even be talking about the second question of
10 whether they breached the contract by not doing those things
11 and, therefore, are required to indemnify?

12 MR. SKOLNICK: We might not, Your Honor, but as
13 defense counsel, I want to have that question on the special
14 verdict as to whether they breached their contract and
15 breached their duty to my client, number one, and whether
16 they have a duty to indemnify my client.

17 THE COURT: I think we would have a jury that
18 would be just utterly confused, but we're getting way, way
19 ahead of ourselves. I asked the question.

20 Thank you.

21 I recognize that the first cause of action in the
22 cross claim and the third cause of action to both be based
23 on allegations of breach of contract. On that basis I'm
24 denying the motion. I find that there is enough evidence to
25 support the possibility of renewal by the action of the

1 parties and performance under the contract by the action of
2 the parties.

3 There appears to be no doubt that the outfitter
4 showed up the next year. I'm satisfied that under contract
5 law there is enough at least to suggest facts that may
6 constitute a renewal by action, and, of course, the conduct
7 of the parties. I am not, by ruling this way, validating an
8 indemnification claim. I am not. It is labeled that in the
9 cross claim. That is about the only place I think the word
10 is used until paragraph 33 when indemnification is only
11 associated with Section 78-B-5-823 of the Utah code. I may
12 have missed it somewhere else.

13 Otherwise, your third cause of action, Mr.
14 Skolnick, appears to me to be based solely on a breach of
15 contract theory. I'll let it go forward on that basis, but
16 I want it to be clear that I am not recognizing an
17 indemnification claim. If discovery should expose one, I
18 will allow a request for leave to amend the complaint. For
19 the law of the case I want that to be clear. At this point
20 I see no contractual basis for arguing that there is an
21 indemnification provision. There is only a provision that
22 requires what is required in 2-A through F, and that
23 includes the insurance provision and the agreement to
24 observe safety rules and so on.

25 If in the end that amounts to something like

1 indemnification, I would prefer to slug out that legal
2 battle later, but right now I see two breach of contract
3 claims which I find sufficiently pled to allow discovery to
4 go forward.

5 Do you need clarification on that or do you have
6 any questions?

7 MR. SKOLNICK: Not on my part, Your Honor. Thank
8 you.

9 THE COURT: Over on this side, Mr. Concannon?

10 MR. CONCANNON: No. Thank you, Your Honor. That
11 is clear.

12 THE COURT: I wonder if you would draft something
13 up in that regard including my language about
14 indemnification?

15 MR. CONCANNON: Yes.

16 THE COURT: Thank you for your arguments. It is
17 kind of an interesting thing.

18 Are we getting close to settling this thing? No?
19 I don't see any indication of that.

20 Thank you.

21 We'll be in recess.

22 MR. BROWN: Your Honor, I am sorry, but I had one
23 small matter I was hoping the Court could address. There is
24 a motion for a protective order floating around. P.A.D.I.
25 and the plaintiffs had jointly moved for a protective order

1 pertaining to an agreement that was reached between P.A.D.I.
2 and the plaintiffs that we needed to disclose to the other
3 parties and to disclose to the Court. Blue Water had
4 responded to our motion and proposed an alternative
5 protective order, and we filed a reply saying we are fine
6 with the form of the order that Blue Water proposed, but
7 nobody else had responded to it. I brought copies of the
8 order, and I wondered if the Court wouldn't mind considering
9 signing that today?

10 THE COURT: Does every party agree to it?

11 MR. BROWN: Yes, Your Honor.

12 THE COURT: Well, then I will gladly sign it.

13 Bring it up.

14 MR. BROWN: I do have copies for anybody else that
15 wants --

16 MR. WALDBILLIG: I assume that the order will come
17 out on the electronic filing.

18 MR. BROWN: Okay.

19 THE COURT: All right. On the order I am
20 scribbling out proposed and I signed the protective order.

21 MR. BROWN: Thank you very much.

22 THE COURT: We are in recess.

23 (Proceedings concluded.)

24

25